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JAMES H. McKE

Supreme Court of the United States

October Term, 1906

No. 145

James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (formerly a corporation),

Plaintiff in Error,

vs.

The Weston Lumber Company (a corporation),

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief for Plaintiff in Error.

PATTERSON A. REECE,
VIRGIL I. HIXSON,
Counsel for Plaintiff in Error.

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Brief for Plaintiff in Error.

STATEMENT.

James B. Swing, as the Trustee for the creditors of The Union Mutual Fire Insurance Co. of Cincinnati, Ohio, plaintiff, (appointed by the Supreme Court of Ohio, and under its orders) began an action in Michigan against The Western Lumber Co., defendant, for said defendant's due proportion of the unpaid liabilities of said insurance company, incurred during the time said defendant held its policy of insurance therein.

Said insurance company was organized under the laws of Ohio, but was not licensed to do business in Michigan.

The defendant was and is a resident of the State of Michigan and the property insured was located there.

No act in regard to said policy was done in Michigan by any one representing said insurance company.

THE FEDERAL QUESTION.

The Supreme Court of Michigan decided that the plaintiff could not maintain this action in Michigan, because, in said court's opinion, the issuing of a policy by such unlicensed insurance company, insuring persons and property located in Michigan, constituted, in itself, a violation of the Michigan statutes; notwithstanding that the policy was not solicited by any person for said insurance company, nor was it issued nor delivered within the State of Michigan, nor was anything done in regard to that policy within that state, by any one in any way representing said insurance company.

THE ERROR RELIED UPON BY PLAINTIFF.

That the Supreme Court of Michigan erred in adjudging that the courts of Michigan were not open to said insurance company nor to the plaintiff as the Trustee for the creditors, because the insurance company, unlicensed by the State of Michigan, had issued the insurance policy, insuring the defendant, whose residence was within said state and on property located there; notwithstanding that there was nothing done, by any one representing said insurance company, within the State of Michigan.

That such erroneous judgment of the Supreme Court of Michigan in its interpretation of the laws of that state, is

repugnant to and in conflict with Sec. 1, 14th Amendment to the Constitution of the United States, which declares that:

> "No state shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And that this plaintiff in error was denied and refused the right to maintain this action in the courts of said state, contrary to said provisions of Sec. 1, 14th Amendment of the Constitution of the United States. (Rec., p. 47.)

THE MICHIGAN STATUTE

which the Supreme Court of Michigan construed to mean that this plaintiff could not maintain this action in Michigan, notwithstanding that said court admits in its decision that no person, in any way representing that insurance company, did any act within the State of Michigan regarding this matter, is in the following words:

> "It shall not be lawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state any insurance business for any person, persons, firm or co-partnership, who are non-residents of this state, or for any firm or inland navigation insurance company or association, not incorporated by the laws of this state, or to act for or in behalf of any person or persons, firm or corporation, as agent, broker, or in any other capacity, to procure, or assist to procure a fire or inland marine policy or policies of insurance on property

situated in this state, for any non-resident person, persons, firm or co-partnership, or in any company or association without this state, whether incorporated or not, without procuring or receiving from the Commissioner of Insurance the certificate of authority provided for in section 23 of an act., etc., and section 10467 of the Compiled Laws of 1897 provides that when by the laws of this state, any act is forbidden to be done by any corporation or by any association of individuals without express authority by law, and such acts shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act." (Rec., p. 41.)

ARGUMENT.

POINT I.

The insurance broker employed by the defendant was the defendant's agent, and his acts in obtaining the policy were the defendant's acts. And no act done by the defendant or his agent can be imputed to the insurance company so as to be construed to be a violation by it of the Michigan statutes.

(*a*) In the policy held by the defendant in said insurance company was the condition:

> "In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of this company." (Rec., p. 28.)
>
> "What the Company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance, was,

to exclude the possibility of such person being regarded as its agent, under any circumstances whatever, or in any transaction relating to this insurance. This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used."

GRACE vs. AMERICAN CENTRAL, 109 U. S., 278-285.

To the same effect are:

WOOD vs. FIREMEN'S F. INS. CO., 126 MASS., 316;

SHAWMUT M. F. INS. CO. vs. STEVENS, 9 ALLEN 334 (MASS.);

WEIDERT vs. STATE INS. CO., 19 ORE. 261;

FIRE ASSOCIATION vs. HOGWOOD, 82 VA. 342.

(*b*) The evidence in this case is clear that Mr. Marsh did in fact, act as the agent of the defendant in obtaining this insurance. That he had all of the defendant's insurance and defendant gave him full and general authority to get insurance for them, in any companies he thought best, so as to keep their property covered. (Rec., pp. 8-10.)

"Glenn & Son wrote to Bridges, an insurance agent, asking additional insurance upon their merchandise, designating no company nor rate, but authorizing him to obtain a policy for them. These facts constituted Bridges the agent of the insured for the purpose of obtaining the policy."

EAST TEXAS vs. BLUM, 76 TEX. 653.

"Where the assured were applied to by insurance brokers to affect additional insurance upon their works and upon such being given, the brokers approached the secretary of the defendant company, who instructed the

brokers to send a form or description of the property, and that the policy would be forwarded, and where the application was filled in by the broker, without the company's instruction or knowledge: HELD, that such broker was the agent of the assured, and not of the company."

McFARLAND vs. PEABODY INS. CO., 6 W. VA. 425.

"In all cases the familiar rule respecting the relation of principal and agent applies, that, within the scope of his authority to procure insurance, he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it were done by such principal."

JOHN R. DAVIS LUMBER CO. vs. HARTFORD F. INS. CO., 95 WISC. 234.

To the same effect are:

AM. FIRE INS. CO. vs. BROOKS, 83 MD. 22;
BUICK vs. INS. CO., 103 MICH. 75;
INS. CO. vs. REYNOLDS, 36 MICH. 502;
JOHNSON vs. NORTH BRITISH, 66 O. S. 6;
DULUTH vs. KNOXVILLE F. INS. CO., 85 TENN. 76.

(*c*) In this case the Michigan courts found and decided that the broker was the agent of the defendant in securing the insurance.

In the Court's conclusions it uses these words:

"For the disposition of this case we may assume that Marsh acted as the agent of defendant in securing the insurance and so come directly to the leading contention presented, involving the validity of this contract under the laws of Michigan." (Rec., p. 41.)

"While this may be held to be an Ohio contract,

nevertheless we cannot escape from the fact that it was a contract to insure within the state of Michigan property of a citizen of the state, and was taking an insurance risk in this state." (Rec., p. 42.)

So it appears that in this case:

(*a*) It was provided in the policy that no person should be considered the agent of the company unless authorized in writing, and that such provision is legal and binding;

(*b*) That according to the defendant's own witness, Mr. Marsh was in fact the agent of the insured, and not of the insurance company;

(*c*) That the court throughout considered that Mr. Marsh was the agent of the defendant.

Then it can safely be accepted as a fixed fact in this case that the broker, Mr. Marsh, acted solely in the interests and as the agent of the defendant. No person within the State of Michigan, other than Mr. Marsh, appears in any way to have been connected with the procuring of that policy.

POINT II.

The mere insurance of a resident of Michigan, upon property located there, is not "doing business" within that state, in fact nor in law where no act was done there by any person representing the insurance company.

As has been clearly shown under Point I, the evidence in this case shows, and the decision of the Michigan Courts is, that the insurance company did not have any person within the state of Michigan, to attend to any thing relating to this matter.

But that, on the contrary, the defendant sent outside of the state of Michigan by its agent, Mr. Marsh, and con-

summated by mail from outside of Michigan, a contract of insurance, insuring the defendant against loss by fire, etc., on their property located in Michigan.

And the decision of the Supreme Court of Michigan in this case, as cited and quoted under Point I, is based upon the theory that the mere insurance of residents of Michigan upon property located there is of itself "doing business" within that state; notwithstanding that no act was done there by any person representing the insurance company.

That this theory is erroneous, we believe can be made plain both by reason and precedent.

> "Has not a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract, outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case where the contract was made outside the state and as such was a valid and proper contract. . . . The only admitted facts concerning the contract was that said company had written insurance upon property in this state for the benefit of a citizen thereof. This did not furnish ground for the abating of the action."
>
> ALLGEYER vs. STATE OF LOUISIANA, 165 U. S. 578; 17 SUP. CT. 427; 41 L. Ed. 632.

And See Holder vs. Aultman, 169 U.S. 81; (Fr. Mich. Ct.

To the same effect are:

SWING, Trustee vs. HILL, 165 IND. —; 75 N. E. 658; (Oct. '05.)

SWING, Trustee vs. EVANSVILLE, — IND. —; 76 N. E. 1117; (Mar. '06.)

SWING, Trustee vs. BRISTER, — MISS. —; 40 S. 146; (Mar. '06.)

TABOR vs. GOSS, 11 COLO. 419;

NEW ORLEANS vs. RHENISH, 31 LA. AN. 781;

"The issuing of a policy in New York on property here cannot be considered as the carrying on of business in this state (ARKANSAS) within the intent and meaning of the statutes in question."

MARINE vs. ST. LOUIS, 41 FED. REP. 654;
And see HYDE vs. GOODNOW, 3 N. Y. 271:

"A foreign insurance company does not DO BUSINESS in this state where no person in the state is authorized to ACCEPT applications for insurance, receive or collect moneys thereon, or to receive or collect on any other account for the said company, but where all applications are sent direct to the foreign office, from which all policies are issued."

FULTON vs. COMMERCIAL T. M. A., 172 PA 117; 33 ATL. 324;

(In the case at bar the insurance company did not even receive the application nor do anything inside of Michigan, and the Michigan courts found that it was an Ohio contract. Rec., p. 42.)

"A foreign building and loan association having its office in the state of its domicile, where all contracts are passed upon, does not, in making a loan to a citizen of Pennsylvania on a bond, through an agent in Pennsylvania, and taking as security for the debt a mortgage on Pennsylvania real estate, make a Pennsylvania contract governed by the usury laws of this state; nor is the association DOING BUSINESS IN PENNSYLVANIA within the meaning of the act of April

22, 1874, requiring registration of foreign corporations."

PEOPLES B. & L. A. vs. BERLIN, 201 PA. 1; 50 ATL. 308; 88 A. S. R. 764;

"Taking an application for life insurance by an agent in WASHINGTON territory, and forwarding to the insurance company in KANSAS, which alone had authority to accept, or reject the application, and where it was accepted, and a policy issued thereon, *is not "doing insurance business"* in said territory, within the meaning of the statute thereof."

HACHENY vs. LEARY, 12 OREGON 40.

"The negotiations were all carried on by mail, through agents in TENNESSEE, the loan being approved at the company's home office in NEW YORK, and all notes being payable at that office. Held, that the contract was made in New York, and to be performed there, and that the company *was not doing business in TENNESSEE* within the meaning of the statutes. A federal court will not refuse to enforce a valid contract, harmless in itself, which is non-enforceable in the state courts merely on account of noncompliance with state administrative regulations."

EASTERN vs. BEDFORD, 88 FED. REP. 7.

"In such an action it appeared that the insured resided, and the property was located, in the state of Maine; that the insurance company was a Tennessee corporation having no office nor agent in Maine; and that the insurance was effected by correspondence through the mails. Held, in consideration of a further provision of such statute requiring insurance companies "doing business" in the state to procure a license for that purpose, that *these facts did not constitute a carrying on of business in the state of Maine."*

HAZELTINE vs. MISS. VAL. FIRE INS. CO., 55 FED. REP. 743 (TENN. CIR.).

POINT III.

The statutes of Michigan could not, under the provisions of our Federal Constitution, prohibit a resident of that state from procuring in another state, from an insurance company not authorized to do business in Michigan, insurance on property belonging to defendant, although located in Michigan.

And the Supreme Court of Michigan, by refusing to allow plaintiff to maintain this action, notwithstanding that the business was transacted entirely outside of the state of Michigan, has construed the statutes of that state so as to be violative of Sec. 1, 14th Amendment of the Constitution of the United States, in that it has abridged the privileges and immunities of plaintiff as a citizen of the United States, and has deprived him of property without due process of law, and has denied to him the equal protection of the laws.

The following decisions of this court seem to fit this case:

> "The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits, while he himself remains within it. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the

contrary notwithstanding. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal."

ALLGEYER vs. LOUISIANA, 165 U. S. 591.

See Holder vs. Aultman, 169, U.S, 81; [illegible] Mich. Ct

"The provisions of the fourteenth amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the law, applies to corporations."

PEOPLE vs. CENTRAL, 118 U. S. 394;

And previous constructions of the same statute by the Supreme Court of Michigan are exactly in line with the above, viz.:

"The statute (Comp. L. 1871, Sec. 1683) regulating the transaction of the business of insurance in this state by the agents of foreign companies, does not assume to forbid the making of contracts of insurance abroad upon property here, nor does it assume to invalidate such contracts, but applies only to operations *within the state.*"

CLAY vs. HURON, 31 MICH. 346.

"Where an application for life insurance in a foreign insurance company is made in MICHIGAN, but, under its by-laws indorsed on the policy, is non-operative until approved by the home medical director, and from which it is also apparent that no binding contract was to be consummated until such approval and the payment of the membership fees at the home office; and it is further provided in the blank form for membership, signed by the insured, that the contract of insurance shall be

considered as entered into at the place where such office is located, and shall be governed by, and construed in accordance with the laws of the state in which the corporation resides, the contract will be treated as one made in the last named state."

VOORHEIS vs. PEOPLES, 91 MICH. 469.

And the latest decisions of the Supreme Courts of all the states (excepting Michigan and Wisconsin) are in harmony with the above decisions on this question, viz.:

"In a suit by a trustee for creditors of a foreign mutual fire insurance company to recover a statutory liability against policyholders, it was no defense that the company had written defendant's policy, insuring property in Indiana, for the benefit of defendants, who were citizens of that state, without having complied with its insurance laws; the legislature having no authority to prohibit citizens from making contracts outside the state insuring property within its jurisdiction."

SWING vs. HILL, 165 IND. —; 75 N. E. 658; (Oct. 1905).

Followed in SWING vs. EVANSVILLE, —— IND. —; 76 N. E. 1117; (Mar. 1906).

And see SWING vs. BRISTER, —— MISS. —; 40 S. 146; (Mar. 1906).

"Foreign insurance companies issuing policies from their own domiciles, who do not carry on business here, who have no agent here, and who only agree to accept risks placed for them by a person residing here, cannot be compelled to pay a license tax."

NEW ORLEANS vs. RHENISH, 31 LA. AN. 781.

"There is and could be nothing in this statute by which a citizen of Missouri or one owning property therein is or could be deprived of the right to insure

such property in the state of Illinois in a company authorized under its laws to insure that property there if he saw proper to do so; and having no extra-territorial force, there is and could be nothing to deprive such company of the right to insure that property if it saw proper to do so."

LUMBERMENS MUT. INS. CO. vs. RAILWAY, 149 MO. 165; 50 S. W. 281;

"A contract of insurance made out of this state on property here situated is valid, and will be enforced here."

COLUMBIA vs. KINYON, 37 N. J. L. 33;

"A State statute imposing on insurance companies of another State or nation the same obligations and prohibitions that are imposed in such other State or nation upon corporations of the former State, is retaliatory in character, and must be confined to cases fairly within its letter."

STATE vs. FIDELITY, 49 O. S., 441.

"Taking an application for life insurance by an agent in WASHINGTON Territory, and forwarding to the insurance company in KANSAS, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not 'doing insurance business' in said territory, within the meaning of the statute thereof."

HACHENY vs. LEARY, 12 OREGON, 40.

"A statute which should attempt to prevent a non-resident owner of property in this State, or a resident owner not at the time within the State, from insuring his property in any manner lawful in the place of the contract, would be void as extra-territorial. If a citizen of PENNSYLVANIA has incurred a liability by a contract validly made outside its boundaries, no law of this State can, under the constitution of the United

States, prevent his fulfillment of that obligation, even by an act done within the State."

COMMONWEALTH vs. BIDDLE, 139 PA. ST., 605.

"A foreign building and loan association, having its office in the State of its domicile, where all contracts are passed upon, does not, in making a loan to a citizen of Pennsylvania on a bond, through an agent in Pe nsylvania, and taking as security for the debt a mortgage on Pennsylvania real estate, make a Pennsylvania contract governed by the usury laws of this State; nor is the association DOING BUSINESS IN PENNSYLVANIA, within the meaning of the act of April 22, 1874, requiring registration of foreign corporations."

PEOPLE'S B. & L. A. vs. BERLIN, 201 PA., 1; 50 ATL., 308; 88 A. S. R., 764.

And see FULTON vs. COMMERCIAL T. M. A., 172 PA., 117; 33 ATL., 324.

SUMMARY.

So in this case it clearly appears:

1. That the insurance broker employed by the defendant was the defendant's agent, and his acts in obtaining the policy were the defendant's acts, and the Michigan Courts so considered them.

That no act done by the defendant or his agent can be imputed to the insurance company so as to be construed to be a violation by it of the Michigan statutes.

2. That the mere insurance of a resident of Michigan, upon property located there, is not "doing business" within that State, in fact nor in law, where no act was done there by any person representing the insurance company.

3. That the Supreme Court of Michigan, by refusing to allow plaintiff to maintain this action, notwithstanding that the business was transacted entirely outside the State of Michigan, has erred, and has, construed the statutes of that State so as to be violative of Section 1, 14th Amendment of the Constitution of the United States, in that it has abridged the privileges and immunities of plaintiff as a citizen of the United States, and has deprived him of property without due process of law, and has denied to him the equal protection of the laws.

For the foregoing reasons the decision of the Supfeme Court of Michigan in this case should be reversed.

Respectfully submitted,

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